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Walter Harrison Hitchler

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SOME CRIMINAL CASES OF 1942  
IN PENNSYLVANIA

WALTER HARRISON HITCHLER\*

## ATTEMPT

It has been stated that there is no title less understood by the courts or more obscure in the textbooks than that of the crime of "attempt." The courts, therefore, should not resort unnecessarily to this concept. The court did so in *Commonwealth v. Haines*.<sup>1</sup> In this case, the defendant, intending to aid bookmakers to evade arrest, telephoned to their headquarters to inform them of an impending raid. The bookmaker had left the premises a *few hours* earlier.

The defendant was not accused or convicted of the crime of "attempt," but of the crime of malfeasance in office "by attempting" to aid and abet the bookmaker to evade arrest and prosecution for bookmaking. In sustaining the conviction the court, however, resorted to the concept of the crime of "attempt," and said: "There are two elements involved in an indictable attempt: first, the intent to commit the crime; and, second, an ineffectual act done toward its commission, both of which were shown in this case."

It is not quite that simple. The accomplishment of the object which the defendant intended was, under the circumstances, impossible; and the courts have experienced great difficulty in deciding whether one may be held guilty of an attempt to commit a crime if the commission of the crime is under the circumstances impossible. The court did state that the act done must be "sufficiently proximate" to the intended result, and held that the facts of the case satisfied this rule because "if the message had been a *few hours* earlier it would *probably* have accomplished its purpose."

## BATTERY

A crime is composed of two elements: (1) a particular physical condition; and, (2) a particular mental condition. The physical element of a crime consists of an act causing or tending to cause a certain result. The physical element of the crime of battery is an act causing a contact with the person of another.

The mental element of a crime is more complex. It is well settled that the physical activity which is a factor of the physical element of a crime must have been intended. A spasm is not an act. But in order to hold a person criminally responsible for a result which his act has caused it is not always necessary that he should have intended that his act cause that result. A person is sometimes responsible for a result of his act which he did not intend to cause because (1) he in-

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\*University of Virginia Law School, LL.B. 1905; Dickinson College, D.C.L. 1932; St. Francis College, LL.D. 1932; Professor, Dickinson School of Law, 1906—; Dean of Dickinson School of Law, 1930—.

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<sup>1</sup>147 Pa. Super. 165, 24 A. (2d) 85 (1942).

tended to cause another wrongful result, or (2) he was not sufficiently careful to avoid causing the result, or (3) merely because his act caused the result.

The Superior Court has recently held that the crime of battery requires not only that the act causing the contact should have been intended but that the actor should have intended that his act should produce the contact.<sup>2</sup>

The tendency to extend criminal responsibility for results unintentionally but negligently caused has been characteristic of the criminal law for centuries. The most striking illustration of this tendency in modern times has been the development of the doctrine that negligence furnishes a basis for a conviction of assault and battery. The concept of a negligent battery seems to be fully developed in many states.

The decision of the Pennsylvania court produces the remarkable result that one may be held criminally responsible for an unintended contact which causes the death of another but may not be held criminally responsible for an unintended contact which produces serious bodily harm.

In justification of its decision the court said: "If one hits another intentionally and knocks him down, that is a plain case of assault and battery; but if one slips on an icy pavement and in the act of falling unintentionally hits another thereby knocking him down, that is not an assault and battery, for the intent to hit the other person is wholly lacking." The court quite obviously confused the intent to act with the intent to cause a contact as the result of acting.

### CONSPIRACY

Crimes are local in two respects. The general rule is that the *locus delicti* furnishes not only the *law* by which a crime is to be defined and punished but also the jurisdiction to punish it.

The crime of conspiracy consists of the agreement between two or more persons to do an unlawful act. No overt act in pursuance of the agreement need be alleged in the indictment nor proved at the trial to sustain a conviction of conspiracy. The agreement is the offense.

It has been held, however, that one may be convicted of a conspiracy in any county or state where an act in furtherance of the conspiracy is committed by any one of the conspirators.

It seems rather remarkable that an act which is not a part of the crime should furnish the basis for convicting one of the crime in a place other than that in which the crime was committed. The agreement, it was said, is renewed as to all the conspirators, whether present or not, by the commission of the act by any one of them.

The rule as applied to counties of the same state is not particularly objectionable. But the same rule has been applied in regard to different states. The courts

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<sup>2</sup>Com. v. Ireland, 149 Pa. Super. 298, 27 A. (2d) 746 (1942).

have not distinguished the question as to the proper place of trial of a crime committed within the state, which is a question of venue, from the question of the jurisdiction of the trial of a crime which is really committed entirely within another state.

The Superior Court has recently reasserted the rule as to counties.<sup>3</sup> The rule as applied to states may give rise to some perplexing questions of conflict of laws.

A case dealing with another principle of conspiracy law was *Commonwealth v. Daley*.<sup>4</sup> It was held that it was a criminal conspiracy to agree to violate Section 22 of Article XIX of the City Charter Act of 1929, by directing the false marking and grading of applicants who had taken a civil service examination, even though the examinations were void because Sections 13 and 14 of Article XIX, regulating the giving of the examinations, had not been complied with. The court stated that under any other holding Section 22 could easily be rendered nugatory, cited one case in support of its opinion, and did not clearly state the principle upon which it relied.

The principle usually stated in support of similar decisions, of which there are many, is that it is immaterial that the accomplishment of the object of the conspiracy is impossible.<sup>5</sup>

#### CRIMES AND CIVIL INJURIES

The theory of the common law is that where an act constitutes both a crime and a civil injury the punishment for the crime cannot be imposed and redress for the civil injury awarded in a single judicial proceeding. Exceptions to this rule have been created by statute. The general theory is illustrated by the decision in *Commonwealth v. Widmeyer*.<sup>6</sup> A proceeding against a husband for non-support was instituted under the Act of 1867, which is not a criminal statute and whose "purpose is the protection of wife and children," and before its completion the proceeding was shifted to and subsequent steps were taken under an "entirely distinct and strictly criminal statute," the Act of 1903, whose "purpose is the punishment of deserting husbands."

The court ordered that the defendant pay (1) the costs of his extradition, and (2) pay the wife \$100 a month for support. "One charged with non-support under the Act of 1867 may not be extradited as for a crime." Consequently an order to pay the costs of extradition must have been made under the Act of 1903.

Under the Act of 1903 the court may enter an order for support but only after a conviction in a jury trial. The defendant was not tried by a jury but was ordered by the court to plead guilty to a charge of desertion and non-support under the Act of 1903.

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<sup>3</sup>Com. v. Mezick, 147 Pa. Super. 410, 24 A. (2d) 762 (1942).

<sup>4</sup>147 Pa. Super. 545, 24 A. (2d) 91 (1942).

<sup>5</sup>See 15 C. J. S. 1070.

<sup>6</sup>149 Pa. Super. 91, 26 A. (2d) 125 (1942).

The Superior Court held that there was no authority for mixing what should be separate proceedings under the respective Acts, and stated: "The order of the court is reversed, the record remitted to the court below with directions to have this case, which was evidently considered by the court below as a misdemeanor, as an indictment was found, tried before a jury."

### CRIMINAL STATUS

The law may make criminal a course of conduct or mode of life without regard to the commission of any one particular crime. It may make criminal a criminal status not due to the perpetration of a specific offense, presently or in the past. This would seem to be the purpose of the Act of 1901,<sup>7</sup> which is entitled, "An Act relating to the arrest and punishment of professional thieves, burglars, and pickpockets," and of section eight hundred and twenty-one of the Penal Code of 1939.<sup>8</sup>

It has been held, however, that under the provisions of these Acts, persons may be incarcerated without the right to trial by jury, "although they are not charged with any crime," that "the gravamen of the offense charged under the Act consists not of being a professional thief, burglar, or pickpocket, but of frequenting any place for an unlawful purpose," and that "the purpose of the Act is to prevent the commission of crime rather than to punish it."<sup>9</sup> The criminal law never punishes persons simply for the purpose of punishing them. A cardinal principle of the criminal law, however, is that it prevents the commission of crime by punishing it. The Acts of 1901 and 1939 are not exceptions to this rule. Punishment of professional criminals under these Acts will prevent them, temporarily at least, from doing the same act again, and may prevent or deter others. Enforcement of the Act does prevent the commission of crime by allowing the arrest of a person not for a specific crime but because he has a criminal character and a criminal intent although he has not executed the criminal intent or done any act in furtherance of it for which he could be arrested or punished for an "attempt." His arrest prevents the execution of his intent, but his subsequent punishment for having a criminal status and entertaining a criminal intent will tend to prevent him and deter others from acquiring a similar character and entertaining a similar intent.

### PERJURY

The Romanesque law of continental Europe rested fundamentally upon a system of "legal proofs" which was in reality a numerical system. According to this system a single witness was in general not sufficient to prove a fact. For the proof of a majority of issues or facts two witnesses were necessary and sufficient.

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<sup>7</sup>P.L. 492, sec. 1, 18 PS. 2831.

<sup>8</sup>P.L. 872, sec. 821, 18 PS. 4821.

<sup>9</sup>*Com. v. Ginsberg*, 143 Pa. Super. 323, 18 A. (2d) 121 (1941); *Com. v. Bey*, 150 Pa. Super. 93, 27 A. (2d) 457 (1942).

This system was not adopted by the common law. The general rule of the common law is that one witness may be sufficient in every case. To this general rule there arose the single exception that one witness alone, without corroborating circumstances, is not sufficient to convict one of perjury. This exception to the general rule, although an incongruous element in the common law system of proofs, may have had at one time justification in the experience of the courts, but in modern times there are cogent reasons for believing that the rule has outlived its usefulness.

The general rule as to perjury has been held not to be applicable where the defendant has made contradictory statements under oath. "It seems clear that the rule here suffers an exception and that by mere comparison the jury may determine the falsity. The purpose of the rule is to protect the accused from the false testimony of a single witness swearing against him; here no attempt is made to condemn him upon the credit of another person; the rule's protection is not needed; and the rule should fall with the reason."<sup>10</sup>

But the exception does not mean that one must be convicted simply because he made contradictory statements under oath. It is not true that "where conflicting statements are made under oath there is no doubt that the person making them has committed perjury," nor that "the commission of perjury is proved by conflicting statements under oath without more." The witness may have believed that each statement was true at the time he made it.

Nor does the exception mean that an indictment may "charge perjury in the alternative without being required to elect as between the two contradictory statements." The indictment must allege which one of the statements is false and the prosecution must prove the falsity of that statement.

May the falsity of the statement alleged in the indictment be proved simply by proof of the contradictory statement? There is authority to the effect that it may not. The Pennsylvania Court in a recent case seems to say that it may, but "the nature of the statement alleged to have been false makes it perfectly clear that the falsity must have been stated knowingly."<sup>11</sup> Corroborative evidence of the falsity of the statement *may* be needed. It is not, however, *invariably*, needed.

#### POSSESSION OF STOLEN PROPERTY

In early times a person found in possession of stolen goods immediately after the theft was liable to summary punishment without the benefit of an ordinary trial. Later it was held that such possession created a presumption of guilt which required a conviction unless satisfactorily explained. The modern view is that such possession is sufficient to justify an inference of guilt but not enough to create a legal presumption against the accused. There is no presumption in a proper sense of that term.

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<sup>10</sup>7 WIGMORE, EVIDENCE (3rd. Ed. 1940), sec. 2043.

<sup>11</sup>Com. v. Sumrak, 148 Pa. Super. 412, 25 A. (2d) 605 (1942).

But courts still continue to use the language of presumption without making it clear whether the language is intended to mean (1) merely that such possession alone is sufficient evidence upon which the jury *may* decide to convict if they so desire, or (2) that such possession alone creates a presumption, i.e., places on the accused a duty of presenting evidence of explanation so that if he fails to do so the jury *must* convict him.

This was done in a recent Pennsylvania case in which the court charged that recent possession of stolen property raises a *strong presumption of guilt*.<sup>12</sup>

On appeal this instruction was justified because the trial judge meant "a presumption of fact which if not explained away to the satisfaction of the jury warranted a finding in accordance therewith" and "there was no likelihood that the instructions were misunderstood."

#### RESPONSIBILITY FOR THE ACTS OF ANOTHER

The rules governing the criminal responsibility of a principal or master for the acts of his agent or servant differ in origin, terminology, and content from the rules governing the civil responsibility of a principal or master for the tort of his agent or servant.

The doctrine of *respondeat superior*, as developed in the law of torts, under which one is civilly liable for the acts of his agent or servant even if the acts were unauthorized or forbidden, provided they were committed by the agent or servant acting within the course of business and within the scope of his employment, will not as a general rule constitute a basis for criminal responsibility.

Criminal responsibility through the operation of the doctrine of *respondeat superior* may be imposed by statute, and in recent times there has been a tendency to hold that certain statutes expressly or impliedly impose such responsibility. This tendency is illustrated by a recent Pennsylvania case.<sup>13</sup>

An investigator for the Milk Control Commission went to the defendant's farm and asked him where he could buy milk. The defendant directed the investigator to the dairymaid, who sold the investigator milk at a price lower than that fixed by the Milk Control Commission. The defendant was held criminally responsible for the act of the dairymaid. The court applied the doctrine of *respondeat superior unavowedly* and gave the following reasons for its decision:

1. The offense was statutory and guilty knowledge or intent was not an essential element of it. But it does not follow that because a crime does not require guilty knowledge or intent, one should be convicted for his servant's unauthorized commission of it or *vice versa*. The dispensing with the usual require-

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<sup>12</sup>Com. v. Lindie, 147 Pa. Super. 335, 24 A. (2d) 39 (1942).

<sup>13</sup>Com. v. Jackson, 146 Pa. Super 328, 22 A. (2d) 299 (1941).

ment of guilty knowledge or intent and the imposition of criminal responsibility for the unauthorized acts of one's servant are parallel but disconnected results flowing from a common cause.

2. The defendant should not be permitted "to hide behind his own negligence." But there was no evidence that the defendant had been negligent.

3. "A principal is prima facie liable for the illegal acts of his agent done in the general course of illegal business authorized by his principal." But the defendant was not engaged in an illegal business.

4. "The unlawful sale by the servant is prima facie evidence of assent thereto by the master." The principles of civil liability are thus in reality substituted for the principle of criminal liability by a resort to a presumption.

The court said that "when the defendant indicated to the purchaser that his dairymaid was in charge of sales, he became responsible for her acts." That is the doctrine of *respondeat superior*.

Carlisle, Penna.

WALTER HARRISON HITCHLER